

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PROGRESSIVE MICHIGAN
INSURANCE COMPANY,

Plaintiff,

vs.

Case No. 2005-3246-CK

SAM DIFALCO,

Defendant/
Counter-Plaintiff,

and

CITIZENS BANK,

Defendant,

and

SAM DIFALCO,

Third-Party Plaintiff,

vs.

COLONY MARINE AND
PLATINUM YACHT BROKERS,

Third-Party Defendants.

OPINION AND ORDER

This matter is before the Court on: (1) Progressive Michigan Insurance Company's ("Progressive") motion for summary disposition pursuant to MCR 2.116(C)(10); and (2) Citizens Bank's ("Citizens") motion for summary disposition pursuant to MCR 2.116(I)(2).



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I.

Progressive alleges that it insured a 30-foot Baja 302 watercraft owned by Sam DiFalco ("DiFalco"). Further, Progressive alleges that on July 12, 2005, DiFalco filed a claim for the alleged theft of the watercraft from Colony Marine. Progressive alleges that, prior to said date, DiFalco had turned over possession and control of the watercraft to Colony Marine and Platinum Yacht Brokers so that they could sell the watercraft for him. According to Progressive, the theft is excluded from coverage pursuant to the "boat sellers" provision of the subject policy.

DiFalco filed a counterclaim against Citizens, alleging that he had been insured for the loss or theft of the watercraft during the time in question. He further alleges that he submitted written notice of the loss to Citizens as soon as practical after the incident.

Additionally, DiFalco filed a third-party claim against Colony Marine and Platinum Yacht Brokers, alleging that he delivered his watercraft to them on or about June 3, 2005 so that they would sell it for him. However, he alleges that they neither sold nor returned the watercraft to him. Moreover, he alleges that the theft was due solely to their negligence.

II.

In reviewing a motion brought under MCR 2.116(C)(10), the trial court must consider the pleadings, as well as any affidavits, depositions, admissions, and documentary evidence submitted by the parties. The evidence should be construed in the light most favorable to the party opposing the motion. The motion should be granted if the evidence establishes that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. MCR 2.116(G)(4)-(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). It is not sufficient for the non-movant to promise to offer factual support for his position at trial.

Smith, supra, at 457-458 n 2. Instead, the adverse party must produce evidence demonstrating that there is a genuine issue of material fact. MCR 2.116(G)(4).

Further, MCR 2.116(I)(2) provides that:

If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

III.

An insurance contract must be read as a whole, with meaning given to every word, clause, and phrase. *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). Further, a construction should be avoided if it would render any part of the contract surplusage or nugatory. *Id.* It is well-settled that an unambiguous provision should be enforced as written unless it is contrary to law or one of the traditional defenses to the enforceability of a contract applies. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). A provision is ambiguous if it is equally susceptible to more than one meaning. *Royal Property Group, LLC, supra*.

IV.

At the outset, the Court will consider Progressive's motion as to DiFalco's claim under the subject policy. Essentially, Progressive contends that there is no genuine issue of material fact that the governing contract language precludes recovery by DiFalco.

Under Part IV - Physical Damage Coverage, the policy contains the following language:

EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART IV.

Coverage under this Part IV does not apply to any loss:

10. due to theft or conversion of a **covered watercraft**:

* * *

- c. while in the care, custody, or control of anyone engaged in the **business** of selling the **covered watercraft**; [emphasis in original text]

The Court is satisfied the alleged theft constitutes a "loss" under Paragraph 6 of the General Definitions. Additionally, the Court is convinced that the subject watercraft is a "covered watercraft" under Paragraphs 4 and 16 of the General Definitions, as well as under the Additional Definitions pertaining to Part IV. The Court is further persuaded that DiFalco's watercraft had allegedly been stolen while in the "care, custody, or control" of entities that were engaged in the "business" of selling the watercraft, as the latter term is defined under Paragraph 3 of the General Definitions. In this regard, DiFalco testified that he left the boat with Colony Marine and Platinum Yacht Brokers with the understanding that they were to do anything reasonably acceptable in connection with trying to sell it. *See* DiFalco's deposition at 45-46.

The Court finds that the above-quoted contractual language is not subject to judicial construction inasmuch as it is clear and unambiguous. *Rory, supra*. When the circumstances of this matter are viewed in light of such language, the Court concludes that there is no genuine issue of material fact that DiFalco's claim is excluded from coverage. Accordingly, Progressive is entitled to the entry of summary disposition in its favor pursuant to MCR 2.116(C)(10). *Smith, supra*.

V.

The Court will next consider the counter motions for summary disposition by Progressive and Citizens as to the issue of Citizens's right of recovery under the subject policy. It is Progressive's position that such coverage is excluded by the terms of the Loss Payee Agreement. While Citizens concurs that said provision governs the instant dispute, Citizens submits that its claim is not precluded thereunder.

Generally, there are two types of "loss payable clauses," commonly known as mortgage clauses. The first type is the "ordinary loss payable clause," which directs the insurer to pay the proceeds of the policy to the lienholder according to its interest before the insured receives payment. Pursuant to this type of policy, the lienholder is merely an appointee to receive the insurance fund to the extent of its interest and its right of recovery is no greater than that of the insured. Moreover, there is no privity of contract between the insurer and lienholder since the lienholder did not pay any consideration. It therefore follows that the lienholder would be precluded from recovering under the policy if the insured breached any of its conditions. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 383; 486 NW2d 600 (1992).

The second type is the "standard loss payable clause." Pursuant to this clause, a lienholder is not bound by the exclusions available to the insurer against the insured since an independent contract exists between the lienholder and the insured. *Id.* at 383-384.

The Loss Payee Agreement at hand provides that:

Payment for **loss** to a **covered watercraft** will be made according to **your** interest and the interest of any Loss Payee or lienholder shown on the **Declarations Page** or designated by **you**. Payment may be made to both jointly, or separately, at **our** discretion.

Where fraud, misrepresentation, material omission, or intentional damage has been committed by or at the direction of **you** or a **relative**, the Loss Payee or lienholder's interest will not be protected.
[emphasis in original text]

Pursuant to Paragraph 18 of the General Definitions, "you" and "your" refer to the individual shown as the named insured on the Declarations Page, as well as that individual's spouse, if residing in the same household. In this regard, the Declarations Page indicates that DiFalco is the named insured. Citizens argues that it is not subject to the "boat seller" exclusion which governs DiFalco's claim since such language is not included in the Loss Payee

Agreement. Instead, Citizens contends that recovery would be precluded only if DiFalco had committed "fraud, misrepresentation, material omission, or intentional damage."

The Court is mindful that *Foremost Ins Co, supra*, has defined two types of "loss payable clauses" and that Progressive relies on the definition of the "ordinary loss payable clause." Notwithstanding, the Court opines that it would be contrary to the interest of justice to elevate mere labels over actual contractual language. The Court therefore deems it appropriate to review the subject provision in light of well-established principles of contract construction, which require consideration of every word and phrase. *Royal Property Group, LLC, supra*.

The Court notes that Part IV of the policy delineates 17 exclusions, including the "boat seller" exclusion contained under Paragraph 10, which was addressed above under Progressive's motion as to DiFalco's claim. If Citizens were to truly stand in DiFalco's shoes, as advocated by Progressive, Citizens would likewise be subject to all 17 exclusions. Under these circumstances, the "fraud, misrepresentation, material omission, or intentional damage" language under the Loss Payee Agreement would be redundant and meaningless. To give effect to such language, it must be construed as constituting the only exclusion that would preclude recovery by Citizens. Inasmuch as "fraud, misrepresentation, material omission, or intentional damage" have not been alleged, Progressive is contractually bound to cover Citizens's claim. It therefore follows that Citizens is entitled to the entry of summary disposition in its favor under MCR 2.116(I)(2).

VI.

For the reasons set forth above, Progressive's motion for summary disposition as to DiFalco's claim, pursuant to MCR 2.116(C)(10), is GRANTED.

Progressive's motion for summary disposition as to Citizens's claim, pursuant to MCR 2.116(C)(10), is DENIED.

Citizens's motion for summary disposition, pursuant to MCR 2.116(I)(2), is GRANTED.

Pursuant to MCR 2.602(B), a judgment shall enter that is consistent with this *Opinion and Order*.

In compliance with MCR 2.602(A)(3), the Court finds that this decision does not close the case.

IT IS SO ORDERED.

EDWARD A. SERVITTO, JR., Circuit Court Judge

Date:

Cc: Gerald Padilla and Charles Huckabay, Attorneys for Progressive

Gad Holland, Attorney for Difalco

Brian Miles and Cheryl Cameron, Attorneys for Colony Marine/Platinum Yacht

Andrew Prine, Attorney for Citizens Bank

Mark Shreve, Attonry for Colony Marine/Platinum Yacht

EDWARD A. SERVITTO
CIRCUIT JUDGE

JUN - 2 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: *[Signature]* Court Clerk